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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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JUN 18 1997

Federal Communications Commission  
Office of Secretary

In the Matter of )

Implementation of the )  
Telecommunications Act of 1996: )

CC Docket No. 96-152

Telemessaging, Electronic )  
Publishing, and Alarm )  
Monitoring Services )

**REPLY TO OPPOSITION TO PETITION FOR  
RECONSIDERATION OR CLARIFICATION**

Southwestern Bell Telephone Company ("SWBT"), pursuant to Commission Rule 1.429,<sup>1/</sup> replies to the Alarm Industry Communications Committee ("AICC") opposition<sup>2/</sup> to SWBT's petition for reconsideration or clarification ("Petition") of the *Second Report and Order* in the above-captioned proceeding.<sup>3/</sup>

**I. SUMMARY**

SWBT's Petition demonstrated that, in determining whether a BOC's sales agency or other marketing arrangement with an alarm monitoring provider is permissible under Section

<sup>1/</sup> 47 C.F.R. § 1.429.

<sup>2/</sup> AICC Opposition to Petition for Reconsideration or Clarification in CC Docket No. 96-152 (filed June 4, 1997) ("Opposition").

<sup>3/</sup> *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing and Alarm Monitoring Services*, CC Docket No. 96-152, Second Report and Order, released March 25, 1997 ("*Second Report and Order*").

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275 of the Act,<sup>4/</sup> the Commission need not, and should not, consider whether the arrangement will be made available to other alarm monitoring providers on a nondiscriminatory basis. Only two parties filed responses to the Petition, and only one of them -- AICC -- opposed it.<sup>5/</sup> Contrary to the assertions of AICC, nothing in Section 275 explicitly or implicitly requires BOCs to enter into alarm monitoring sales agency or marketing arrangements on a nondiscriminatory basis. Similarly, no FCC ruling has been cited in this proceeding that could provide precedent for imposing a nondiscrimination requirement on a non-bottleneck BOC offering such as sales agency/marketing arrangements for alarm services. Indeed, neither AICC nor the *Second Report and Order* has articulated how exploring whether a sales agency/marketing arrangement is available on a nondiscriminatory basis is germane to the analysis of whether the BOC should be considered to be "engage[d] in the provision" of alarm services -- the ultimate question under Section 275.

If the Commission nevertheless decides to retain nondiscrimination as a criterion for evaluating BOC sales agency/marketing arrangements, nothing in AICC's Opposition should dissuade the Commission from granting SWBT's alternative request and clarifying that nondiscrimination is not an absolute requirement for an acceptable arrangement, but only one of a number of factors the Commission may consider. Indeed, AICC's characterization of such nondiscrimination as the "cornerstone" of the Commission's Section 275 policy<sup>6/</sup> and one

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<sup>4/</sup> 47 U.S.C. § 275 (1997).

<sup>5/</sup> BellSouth Corporation filed comments in support of the Petition. BellSouth Comments in CC Docket No. 96-152 (filed June 4, 1997) ("BellSouth Comments").

<sup>6/</sup> Opposition at 5.

of the "clear, bright lines" a BOC cannot cross in offering sales agency services to alarm service providers,<sup>7/</sup> demonstrates -- at the very least -- the need for such clarification.

## II. DISCUSSION

AICC's Opposition fails to rebut any of the Petition's arguments that nondiscrimination should not be a factor in Commission evaluations of whether specific sales agency/marketing arrangements constitute the "provision" of alarm monitoring services. To demonstrate that the Act cannot be read to require BOCs to make sales agency/marketing arrangements available to independent alarm monitoring providers on a nondiscriminatory basis, the Petition relied, in part, on the fact that Section 275 does not contain such a requirement, in contrast to Section 274 which does address making certain marketing arrangements available to others on a nondiscriminatory basis.<sup>8/</sup> SWBT also demonstrated that, absent an express statutory provision, the Commission has applied nondiscrimination requirements only to the basic network or telecommunications services that underlie or support competitive offerings and not to the marketing of such offerings.<sup>9/</sup>

While not challenging the authorities cited in the Petition, AICC argues that they are inapplicable to alarm monitoring services because, by imposing a five-year ban on BOC provision of such services, Congress intended to provide more protection for alarm services than for other services.<sup>10/</sup> Thus, AICC argues, the Commission should impose, if anything, more stringent safeguards on BOC participation in any activity related to alarm services. This

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<sup>7/</sup> *Id.* at 6.

<sup>8/</sup> Petition at 3.

<sup>9/</sup> *Id.* at 3-4.

<sup>10/</sup> Opposition at 3-5.

argument is unavailing. The issue in this proceeding is not what safeguards or protections should apply to a prohibited activity -- the provision of alarm monitoring services.

Obviously, if an activity falls within the prohibition, the BOCs may not engage in it and the issue of safeguards is never reached. The Commission has found, however, that BOC sales agency and marketing services for unaffiliated providers do not constitute the provision of alarm monitoring and the five-year ban does not apply.<sup>11/</sup> The one proviso the Commission added was that the interests of the BOC sales agent and the unaffiliated alarm provider may not be so "intertwined" that the BOC could be considered engaged in the provision of alarm monitoring.<sup>12/</sup> The statutory ban itself provides no guidance on this issue, nor on the question of what safeguards should be applied to the sales agency and other marketing activities that are permitted under Section 275.<sup>13/</sup>

Moreover, neither AICC nor the *Second Report and Order* has provided any explanation how exploring whether the terms of a sales agency/marketing arrangement is available on a nondiscriminatory basis is germane to the "provision[ing]" analysis. AICC merely asserts that allowing BOCs selectively to choose the independent alarm monitoring

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<sup>11/</sup> The FCC expressly rejected AICC's earlier argument that the ban prohibits all BOC arrangements to market or sell alarm monitoring services provided by unaffiliated alarm monitoring providers. *Second Report and Order* at paras. 37-38. Indeed, AICC itself characterizes such arrangements as "ancillary" to the provision of alarm monitoring services. Opposition at 1. Although it is not clear what AICC means by that term, SWBT notes that in *Computer III* the FCC permitted BOCs to offer "ancillary network services" to their enhanced service operations on terms and conditions that differ from those offered to other enhanced service providers. *Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 4 FCC Rcd. 1, 57-58 (1988).

<sup>12/</sup> *Second Report and Order* at para. 38.

<sup>13/</sup> The Commission itself found that comparisons between Section 275 and other sections of the Act that deal with other services *are* relevant in determining which types of BOC activities related to alarm services should be permissible despite the ban on BOC "provision" of such services. See, e.g., *Second Report and Order* at para. 37 (contrasting Sections 272 and 274 with Section 275).

providers for which it will market or act as a sales agent could advance the "commercial success" of the selected providers.<sup>14/</sup> However, this assertion fails to explain how such sales agency arrangements could constitute the "provision" of alarm services by the BOC or an "intertwining" of interests, absent some additional factors.

Thus, where the BOC is not itself performing any of the prohibited alarm monitoring functions, is not holding itself out to the customer as the provider of the alarm services, and has no financial stake in the provider's commercial success, the availability of nondiscriminatory sales agency arrangements appears irrelevant to the consideration of whether the BOC is "providing" alarm monitoring service. Rather, the correct analysis is to determine whether the arrangement is mutually nonexclusive.<sup>15/</sup> In these circumstances, both the BOC and the alarm service provider would remain free to do business with others should either choose to do so, and hence the two would not be intertwined with one another. AICC did not address this argument.<sup>16/</sup>

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<sup>14/</sup> Opposition at 5. AICC also mentions, without elaboration, that such selectivity could create the incentive for a BOC "to exploit its market power," presumably by discriminating in its provision of network services to those providers. *Id.* However, the Commission's CEI requirements are specifically designed to guard against this very possibility and can be applied to BOCs that act as sales agents for unaffiliated alarm service providers. The Common Carrier Bureau adopted this approach in approving SWBT's CEI plan for Security Service:

[We] will generally apply the CEI criteria to require that, in the provision of basic underlying services, SWBT treat alarm monitoring service providers for which it acts as a sales agent or performs marketing no more favorably than alarm monitoring service providers for which it is not acting as a sales agent or performing marketing.

*Southwestern Bell Telephone Company's Comparably Efficient Interconnection Plan for Security Service*, Order, CC Docket Nos. 85-229, 90-623, 95-20, DA 97-1029 (released May 16, 1997) at para. 45 ("*SWBT CEI Order*"). Nothing in AICC's Opposition provides any basis for concluding that this approach is inadequate.

<sup>15/</sup> See Petition at 4-5; see also BellSouth Comments at 3-4.

<sup>16/</sup> AICC at one point does suggest that SWBT is seeking to establish an "exclusive"  
(continued...)

AICC also fails to cite any authority or analogous precedent in which, in the absence of a statutory requirement, the FCC has required BOCs to make non-bottleneck offerings -- such as sales agency/marketing arrangements -- available on a nondiscriminatory basis. In contrast to services to which the Commission traditionally has applied a nondiscrimination requirement, the BOCs have no unique control over the marketing or sales channels available to alarm service providers. In fact, the FCC concluded that alternative marketing channels are "readily available to alarm monitoring service providers,"<sup>17/</sup> and this conclusion holds even if BOCs are allowed to be selective in choosing the alarm monitoring providers on whose behalf they will market or act as sales agents.<sup>18/</sup>

In addition, AICC fails to rebut the Petition's assertion that, if the Commission decides to retain nondiscrimination as a criterion to evaluate BOC/alarm provider sales agency relationships, it should clarify that nondiscrimination is not an absolute requirement but one of

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arrangement with an alarm service provider. Opposition at 5. As explained in SWBT's Petition, there is a difference between nondiscrimination and nonexclusivity. Petition at 4-5. SWBT's sales agency arrangements will be mutually nonexclusive, and it has no objection to this factor being included in the Commission's "intertwining" analysis in evaluating BOC sales agency arrangements.

<sup>17/</sup> See SWBT CEI Order, at para. 40.

<sup>18/</sup> Indeed, even where there is an explicit nondiscrimination obligation in the statute, the Commission has often construed it as applying only to the underlying basic services and facilities. For example, the Commission interpreted the requirement in Section 274(c)(2)(B) that a BOC only engage in "nondiscriminatory" teaming or business arrangements for electronic publishing to mean that a BOC must provide its facilities, services and basic telephone service information on a nondiscriminatory basis to both other teaming arrangements and unaffiliated electronic publishers. It explicitly declined to require a BOC to enter into teaming arrangements with other electronic publishers simply because it had elected to participate in such an arrangement with an electronic publisher of its choice.

*Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, First Report and Order, CC Docket No. 96-152, FCC 97-35 (released February 7, 1997) at para. 168. Moreover, as BellSouth notes, the Commission reached a similar conclusion in construing a nonexclusivity requirement in Section 274(c)(2)(C) for BOC participation in electronic publishing joint ventures. See BellSouth Comments at 4, *citing id.* at paras. 179-80.

"a variety of factors" the Commission may consider in undertaking its "provision" analysis.<sup>19/</sup> AICC characterizes SWBT's request as an attempt to undermine this proceeding's "clear, bright lines" that will force the FCC to determine on numerous occasions whether particular sales agency/monitoring arrangements are proper.<sup>20/</sup> In so arguing, AICC ignores that the Commission already has committed to examine such arrangements on a case-by-case basis,<sup>21/</sup> a decision that has not been challenged on reconsideration. Indeed, AICC's mischaracterization of the Petition as seeking to change the Commission's "clear, bright lines" illustrates the need for clarification.<sup>22/</sup> Absent clarification, it is inevitable that parties such as AICC will continue to ignore the *Second Report and Order's* "variety of factors" and "case-by-case" language<sup>23/</sup> in attempting to preclude BOC sales agency/marketing arrangements. SWBT urges the Commission to clarify its standard to avoid repetitive and wasteful argumentation in future proceedings.

And finally, given AICC's frequent attempts to distort SWBT's position, it is important to reiterate what the Petition actually requests.<sup>24/</sup> Contrary to AICC's allegations,

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<sup>19/</sup> See Petition at 5.

<sup>20/</sup> Opposition at 6.

<sup>21/</sup> *Second Report and Order* at para. 38.

<sup>22/</sup> AICC consistently treats the nondiscrimination fact as a *de facto* requirement for an acceptable BOC sales agency arrangement. See, e.g., Opposition at 4 ("nondiscrimination is central to SBC's compliance with Section 275"); *id.* at 5 (nondiscrimination is "the cornerstone of ... the Commission's policy with regard to Section 275").

<sup>23/</sup> *Second Report and Order* at para. 38.

<sup>24/</sup> In particular, SWBT takes exception to AICC's characterization as "gamesmanship" SWBT's decision to challenge the nondiscrimination portion of the *Second Report and Order* through a reconsideration petition after committing not to discriminate in its CEI Plan. Opposition at 5. AICC wholly ignores the fact that SWBT expressly stated that it would continue to comply with its nondiscrimination commitments unless and until the Commission granted its Petition and the Bureau approved a CEI amendment to implement that change.

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SWBT does not seek to "discriminat[e] in favor of its chosen alarm monitoring provider,"<sup>25/</sup> but rather asks to be allowed to exercise its business discretion regarding the selection of any provider for which it will market or act as a sales agent. As BellSouth aptly noted, there are a host of legitimate business reasons unrelated to the provisioning of alarm monitoring why a BOC should be allowed such flexibility and why such flexibility is fully consistent with a legitimate, arms-length (*ie.*, non-"intertwined") sales agency relationship.<sup>26/</sup>

Moreover, a BOC's compliance with its CEI obligations will prevent it from discriminating in the provision of underlying basic telecommunications services and facilities when it engages in marketing or sales for an unaffiliated alarm monitoring provider.<sup>27/</sup> It is only in this area -- the provision of BOC network services and facilities -- that any legitimate concerns about bottleneck control could conceivably arise for which a nondiscrimination requirement would be the appropriate regulatory response.

Thus, there is neither a statutory nor a policy basis for applying nondiscrimination to a BOC's sales agency or marketing activities on behalf of unaffiliated alarm service providers. The Commission should remove this as one of the factors it will examine in evaluating BOC sales agency relationships or, in the alternative, clarify that it is only one of a number of factors the Commission may consider and not an essential element of an acceptable sales agency arrangement.

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Petition at n.5. In turn, the FCC expressly recognized this pledge in granting SWBT's CEI Plan. *SWBT CEI Order* at paras. 36-37. Moreover, SWBT's approach of committing to one course of conduct based on an FCC ruling while seeking to challenge that ruling on reconsideration is fully consistent with the Communications Act and the Commission's Rules. *See* 47 U.S.C. 405(a); 47 C.F.R. § 1.429(k).

<sup>25/</sup> Opposition at 6.

<sup>26/</sup> BellSouth Comments at 3-4.

<sup>27/</sup> *See* note 14 *supra*.



### III. CONCLUSION

For the reasons stated herein, SWBT urges the Commission to reconsider its *Second Report and Order* in accordance with SWBT's Petition.

Respectfully submitted,

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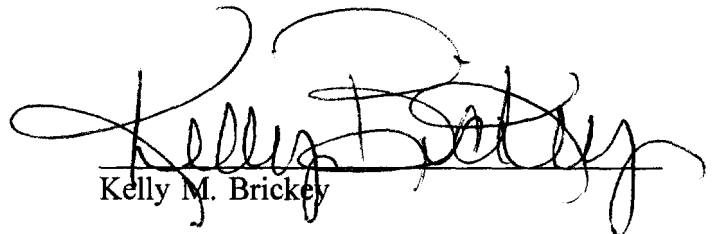
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I, Kelly M. Brickey, hereby certify that the foregoing, "SOUTHWESTERN BELL  
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